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Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT J. DEL TUFO, Attorney General of New Jersey
and C. GREGORY STEWART, Director, New Jersey
Department of Law and Public Safety, Division on Civil Rights,

Petitioners,

vs.

THE IVY CLUB, a New Jersey Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

**BRIEF IN SUPPORT OF PETITION FOR
A WRIT OF CERTIORARI**

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(on behalf of the American Civil
Liberties Union of New Jersey)

QUESTIONS PRESENTED

1. Whether England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) should be extended to permit a party, which first briefed its federal constitutional rights in state court over nine years ago, then fully litigated its federal claims before the state agency and administrative court, and subsequently relied on the extensive federal constitutional arguments of its co-defendant in the state appellate courts, to now litigate the very same claims anew in federal court?

2. Did the Third Circuit err when it allowed Ivy Club to proceed with its complaint, despite its correct ruling that the claim should have been dismissed under Younger v. Harris, 401 U.S. 37 (1971), by balancing the equities and erroneously finding that the New Jersey Supreme Court did not rule on the constitutional questions raised in the instant suit, thereby ignoring the important principles of finality and full faith and credit to state court decisions?

LIST OF PARTIES

Respondent, Sally Frank stands on the list of parties as stated in the petition filed by the state defendants.

Respondent, Sally Frank, is an individual and therefore has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

Reminiscent of the case of *Jarndyce v. Jarndyce* described in Charles Dickens' novel Bleak House, the facts and procedural history of this case are long and complex. The litigation began almost thirteen years ago, in February, 1979, when Sally Frank filed sex discrimination complaints against the Trustees of Princeton University ("Princeton" or "the University"), The University Cottage Club ("Cottage"), Ivy Club ("Ivy") and Tiger Inn ("Tiger"). She did so after she attempted to join all three clubs and was refused admission because she is a woman. What followed is well described in the opinions of the New Jersey Supreme Court, Frank v. Ivy Club, 120 N.J.73 (1990), and the United States Court of Appeals for the Third Circuit, Ivy Club v. Edwards, 943 F.2d 170 (3d Cir. 1991) as well as the petition filed in this Court by the New Jersey defendants. Thus, only a short summary of the history will follow.

The New Jersey Division on Civil Rights ("Division"), dismissed Ms. Frank's original complaint without processing it. Ms. Frank refiled the complaint, and in December, 1979, the Division issued formal complaints. Ivy and Tiger defended against the complaints in part by asserting that they had a freedom of association right to discriminate. App. F at 125. After a cursory investigation, the Division dismissed the complaints in January, 1981. Ms. Frank appealed, and the New Jersey Superior Court, Appellate Division, ("Appellate Division"), reversed the decision and remanded the case for further proceedings. Ivy and Tiger again raised their freedom of association claims in that Court. Appendix of Defendants in Opposition To Motion of Ivy Club to

Reopen, U.S. District Court, ("Dis. Ct. App.") at 9a.¹

The Division then held two day-long fact finding conferences in which each party submitted thousands of pages of documents and outlined the documents relevance to the proceedings; and each party called a witness. Although the witnesses testified without taking an oath, they were subject to cross examination. The parties also agreed to more than 200 factual stipulations.

All parties filed then briefed comments and objections to proposed rulings resulting from these conferences. App. E at 83. The parties briefed the issues a second time for the Director of the Division ("Director") Id. In their briefs, the clubs and Ms. Frank thoroughly argued the question of freedom of association. App. F at 125. In May, 1985, the Director issued a finding of probable cause and jurisdiction, reviewing the issue of freedom of association at some length in light of this Court's decision in Roberts v. United States Jaycees, 468 U.S. 609 (1984), and finding that the clubs did not have a freedom of association right to discriminate. App. F at 169-174.

Ms. Frank then asked that the case be transferred to the Office of Administrative Law ("OAL") to be heard by an Administrative Law Judge ("ALJ"). After that was done, the clubs told the ALJ that they viewed jurisdiction as still undecided. Ms. Frank, therefore, moved for summary decision on the question of jurisdiction. App. E at 97. When the ALJ recommended a ruling in the clubs favor, the question went to the Director who alerted the clubs that she would consider the entire to

¹ A copy of this District Court Appendix has been lodged with the Clerk of this Court.

date and invited the clubs to show her what material facts remained in dispute. The clubs again raised their claims to freedom of association but could not show that there were material facts in dispute. The Director granted summary decision against the clubs, incorporating by reference the discussion of the right to freedom of association in her February, 1986 decision. App. E at 98-100; App. H at 186.

It was only at that point that Ivy and Tiger filed the complaints against the New Jersey state officials in federal district court that are the subject of the instant petition. On the state's motion to dismiss or, in the alternative, for a stay pending further action in the New Jersey proceedings, then U.S. District Judge Cowen, stayed the proceedings, specifically warning Ivy and Tiger not to "erroneously rely on the stay granted by the court as a determination that they may return to federal court to adjudicate their federal constitutional claims." App. D at 75-76.

The proceedings then returned to the OAL. Ms. Frank moved for and was granted summary decision as to liability against Ivy and Tiger.² App. E at 101. It was not granted against Princeton. Ms. Frank settled most of her claims against Princeton in July, 1986, and the case proceeded to a full adversarial hearing before the ALJ on the issue of remedy. The hearing took six days. *Id.* When the hearing began, Ivy, for the first time in the nine years the case had been pending, attempted to reserve its federal claims under England v. Louisiana Board of Medical Examiners, 375 U.S. 411 (1964). Tiger made no attempt to reserve and continued to argue all of

² By this time, Ms. Frank had settled her claims against Cottage Club, and it had admitted women members.

its constitutional claims in all the joint proceedings that followed. First Amendment arguments figured prominently in the arguments to the ALJ not to order the clubs to admit women. The ALJ responded by recommending to the Director that she order the clubs to sever their ties with Princeton rather than to admit women because of those constitutional concerns. App. G at 196.

All parties briefed the issue to the Director. In May, 1987, the Director issued her final order which required the clubs to admit women. In doing so, she reaffirmed her earlier findings on the constitutional issue of freedom of association. App. G at 186.

Ivy and Tiger appealed to the Appellate Division. Both vigorously argued their due process claims to that court. Ivy also purported to reserve its constitutional claims for federal court while Tiger asserted that it had a constitutional right under freedom of association to discriminate. Ms. Frank and the state of New Jersey also briefed all those issues. App. E at 102-103. The Appellate Division reversed and remanded on procedural issues in October, 1988. Ms. Frank petitioned the New Jersey Supreme Court for certification. App. E at 103. In their joint opposition to the petition, Ivy and Tiger unreservedly raised their constitutional claims.

The New Jersey Supreme Court granted certification. Under New Jersey Court rules, the Supreme Court had before it the briefs that had been filed before the Appellate Division. N.J.R. 2:12(11). Ivy and Tiger both argued their due process claims, and Tiger argued freedom of association. Ms. Frank, the state of New Jersey, and amici curiae argued all of the issues. See, e.g., Dis. Ct. App. at 160-174. On July 3, 1990 the New Jersey Supreme Court issued its ruling reversing the

Appellate Division and reinstating, in its entirety, the Director's order. App. E at 122.

Tiger next petitioned this Court for certiorari while Ivy asked that its case be reopened in federal district court. Tiger's petition was denied by this Court in January, 1991. *Tiger Inn v. Frank*, ___ U.S. ___, 111 S.Ct. 799 (1991). Ms. Frank intervened as a defendant in this case, and both the state and Ms. Frank moved for dismissal. The District Court denied the motion but certified the question to the Third Circuit. App. A at 7-8. The Third Circuit ruled that, although the case should have been dismissed in 1986 under Younger v. Harris, 401 U.S. 37 (1971), App. A at 17, because it was not, and because, in its view, Ivy had reserved its claims after the district court decision, Ivy could proceed with the instant case. App. A at 31. Upon seeing that ruling, Tiger moved to reopen its case in the district court, which relying on the Third Circuit decision sub judice, granted Tiger's request and denied the motions to dismiss. The New Jersey defendants moved for rehearing en banc, which was denied, App. I at 198, and their instant petition followed.

I. WHETHER ENGLAND SHOULD BE EXTENDED TO PERMIT DE NOVO FEDERAL COURT ACTIONS AFTER EXTENSIVE STATE LITIGATION OF THE SORT CONDUCTED HERE IS A SERIOUS QUESTION MERITING SUPREME COURT REVIEW.

At issue in this case is whether Ivy Club may avoid the judgment of the New Jersey Supreme Court affirming the New Jersey Division of Civil Rights decision requiring it to cease discriminating on the basis of sex

and litigate the matter all over again in the federal courts. The more than 11 years of proceedings in New Jersey and the nature of Ivy's efforts to relitigate the permissibility of its discriminatory practices in federal courts have already been described. Clear from that history is the importance to Ivy of its claim that an associational right, grounded in the First Amendment, allows it to select males members only, year after year. Ivy's commitment to this position has driven its actions throughout this litigation. Three steps are particularly significant in this regard: First, Ivy argued this point in its very first brief to the state courts in this matter.³ Second, Ivy's conduct in developing the factual record and in making argument reflected its federal constitutional claims throughout the entire course of the lengthy state administrative proceedings.⁴ Third, when the state rejected its claims on the administrative level, with Tiger Inn, its co-defendant, it appealed to the state courts, relying throughout on constitutional arguments of its co-

³ When Frank first appealed the Division's dismissal of her complaint, Ivy's brief to the New Jersey Appellate Division specifically highlighted its First Amendment claims in Argument V which asserted a right to freedom of association. Dis. Ct. App. at 6a.

⁴ For example, when Ivy filed its answer to Frank's complaint in the Division, its Seventh Separate Defense stated, "Respondent has the right to freedom of association pursuant to the First and Fourteenth Amendments of the U.S. Constitution." Dis. Ct. App. at 5a. Similarly, in its initial brief to the Division on Civil Rights, in 1984, Ivy discussed at least twelve cases in an attempt to convince the Director that (as it said in its point heading) "THE RIGHTS OF CLUB MEMBERS TO FREEDOM OF ASSOCIATION AND PRIVACY SHOULD NOT BE ABRIDGED." Dis. Ct. App. at 8a-12a. Likewise, in its reply brief, Ivy addressed the freedom of association question by devoting six pages to a discussion of Roberts v. United States Jaycees, 468 U.S. 609 (1984). Id. at 13a-20a.

defendant.⁵

As the state suggests in its petition, these facts present an important issue of federal jurisdiction that plainly merits Supreme Court review: Does, as the Court held below, the doctrine set forth in England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964) permit a party, which has already consumed substantial time and energies of state personnel (not to mention its opponent) to litigate its constitutional claims de novo in federal court. The Third Circuit decision to expand England in this way should not go unexamined.

In England, *supra*, this Court sets forth a narrow exception to the general rule prohibiting parties from splitting their causes of action between state and federal courts. England thus permits federal courts to hear federal questions specifically held or "reserved" for federal litigation, without giving parties duplicating litigation. To ensure parties a federal forum to adjudicate their federal claims, -- but not two bites of the apple -- England outlines a procedure for proceeding on portions of actions in state court while preserving specified federal claims for later adjudication in federal court. Purposely designed to allocate litigation in a manner that forestalls duplication, England's reservation exception is a limited one: parties must choose their forum at the outset, and not after they consume the other jurisdiction's resources.

⁵ At no time either before or after its "reservation" did Ivy act to separate itself from the state proceedings against Tiger Inn. To the contrary, far from distancing itself from its co-defendant, Ivy carefully divided tasks and coordinated its litigation strategies to complement Tiger's, thereby allowing Ivy to rely on Tiger's federal arguments after it sought to reserve its First Amendment claims. See Point II, *infra*.

Yet the Third Circuit, as its opinion indicates, disregards both the drain on state resources and the failure to accord states sufficient respect, for it extends England to permit relitigation in federal courts of matters in which substantial time and energy have been expended on the state level. Moreover, in so ruling, it places an additional burden on federal court, i.e., the burden of evaluating the state court decisions to determine whether or not the state has addressed the federal claims adequately. In other words, the Third Circuit's expanded version of England also requires the federal courts to expend their resources in evaluating and passing judgment on the decisions of their sister courts.⁶

Full review by this Court is essential before a decision with ramifications of this magnitude is allowed to stand.

II. THE THIRD CIRCUIT CORRECTLY RULED THAT THE CASE SHOULD HAVE BEEN DISMISSED UNDER YOUNGER, BUT ERRED WHEN, IN BALANCING THE EQUITIES, IT DID NOT RECOGNIZE THAT THE NEW JERSEY SUPREME COURT RULED ON THE ISSUES IN THIS FEDERAL LITIGATION AND ITS RULING WAS ENTITLED TO FULL FAITH AND CREDIT.

In Younger v. Harris, 401 U.S. 37 (1971), this Court ruled that federal courts could not enjoin state criminal

⁶ Given federal arguments and the agency's clear ruling on them, the Third Circuit's finding that, in affirming the agency decision, the New Jersey Supreme Court did not rule on the federal claims adequately, is clearly questionable. See Point II, infra.

proceedings unless a plaintiff could show specific irreparable injury that was not the usual injury commensurate with defending against a criminal proceeding. Later opinions extended this principle to call for federal courts to abstain from state litigation when important state interests were at state. In Ohio Civil Rights Commission v. Dayton Christian Schools, 477 U.S. 619 (1986), this Court made clear that its Younger ruling extended to state administrative proceedings which are judicial in nature and designed to investigate and remedy, for as it noted, it had "no doubt that the limitation of prohibited sex discrimination is a sufficiently important state interest to bring the present case within the ambit of the cited authorities." Id. at 628.

The instant case involves an attempt first to enjoin and then to nullify the results of a New Jersey state administrative ruling upholding that administrative agency's decision in a sex discrimination complaint. New Jersey, like this Court, views discrimination as an important issue of state concern. In the words of the New Jersey Supreme Court, "[P]revention of unlawful discrimination vindicates not only the rights of individuals but also the vital interests of the state.... [S]uch discrimination is regarded as a public wrong and not merely as the basis of a private grievance." David v. Vesta Co., 45 N.J. 301, 327 (1965). Moreover, the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq., creates an administrative procedure to adjudicate discrimination complaints in a judicial manner. Thus, the Third Circuit was correct that, in keeping with the Supreme Court's approach in Dayton, the District Court should have abstained from this case and dismissed it when it was filed. App. A at 17.

The Third Circuit erred, however, when it balanced

the equities, found that Ivy should have an opportunity to have its federal claims adjudicated in federal court, and allowed the lawsuit to continue. The Court of Appeals based its decision, in part, on its conclusion that the New Jersey Supreme Court acceded to Ivy's attempt to reserve its federal claims by failing to rule on those claims. App. A at 22-23. That conclusion was incorrect.

While the Third Circuit was correct that Ivy, its brief to the Appellate Division later transmitted to the New Jersey Supreme Court, attempted to reserve its freedom of association claim for federal court, Tiger, Ivy's co-defendant, fully argued its freedom of association claims. Moreover, Ivy and Tiger fully argued their due process claims to the New Jersey courts despite Ivy's purported reservation of those claims. Ms. Frank and the Division as well as amici responded to those arguments, explaining to the New Jersey Supreme Court that neither Ivy nor Tiger had had its rights violated in the New Jersey proceedings. Likewise, the parties fully presented these positions during oral argument to the Court.

When it issued its ruling in July, 1990, the New Jersey Supreme Court fully addressed the clubs' contentions that the procedures the Division used to determine their claims violated their rights. In doing so, the Court found that summary decision was appropriate because there were no material facts in dispute. See Frank v. Ivy Club, 120 N.J. 73, cert. den. sub. nom. Tiger Inn v. Frank, ___ U.S. ___, 111 Sup. Ct. 799 (1991). Ivy's claims that its due process rights had been violated was decided against it by the New Jersey Supreme Court.

However, the New Jersey Supreme Court did not go only to the due process procedural issues. It ruled, in addition, on the freedom of association issue. Nowhere

does the Court state or suggest that it is reserving a ruling on freedom of association because of Ivy's alleged reservation of that issue. Rather, the Court ruled on the issues before it. In describing the rulings of the Division of Civil Rights, the Court noted, "The Division rejected the argument that the Club members' constitutional free-association rights would be violated if the Clubs were subject to LAD." App. E at 96. The Court then proceeded to reinstate the order of the Division on Civil Rights. App. E at 122. In the Director's final order upheld in the New Jersey Supreme Court, the Director reaffirmed her explicit ruling that the Club's "reliance on free association rights is...misplaced." App. G at 186. Thus, the New Jersey Supreme Court could not have reinstated the Director's order without determining that freedom of association did not apply. In the absence of a specific statement that it was not ruling on the issue, the conclusion of the Third Circuit is simply untenable.

Once it is accepted that the New Jersey Supreme Court, by reinstating the Director's order, upheld her conclusions as to freedom of association, it is evident that the Third Circuit's balancing of the equities was erroneous. Ivy's federal claims were adjudicated by the New Jersey Supreme Court. Having appealed the administrative decision to the New Jersey courts, Ivy could not seek further review by the federal courts except through a certiorari petition. The New Jersey Supreme Court's ruling is and was entitled to full faith and credit in the federal courts. 28 U.S.C. § 1738.

Review by this Court of the erroneous decision of the Third Circuit is important to reinstate and reemphasize the importance of finality in litigation if the decision of the Third Circuit is allowed to stand, numerous parties who had co-defendants in litigation will

be able to take advantage of the scheme Ivy and Tiger used in this litigation to assure full federal consideration of issues fully litigated in state court. In this dispute, after the 1986 federal court stay, Ivy chose to attempt to reserve its federal claims while Tiger continued to argue them. Thus, if Tiger won on its freedom of association claims, Ivy would also win. If Tiger lost, however, Ivy would be able to return to federal court and relitigate the issues there. The wastefulness and absurdity of this litigation scheme was fully realized when the federal District Court Judge allowed Tiger to reopen its federal claims in this case in November, based on the Third Circuit's conclusion that the New Jersey Supreme Court had not decided the constitutional issues despite Tiger's full litigation of those issues all the way to the Court. The Third Circuit's ruling has therefore allowed both clubs to have their cake and eat it too. Both clubs are being permitted to litigate their claims fully through both the state and federal system. Review by this Court could prevent other litigants from abusing the system in this way.

This Court has repeatedly emphasized the importance of finality in litigation. See, e.g., International Union of Mine, Mill, & Smelters Workers Local No. 15 v. Eagle Picher Mining & Smelting Co., 325 U.S. 335, 340 (1945); McCleskey v. Zant, ___ U.S. ___, 111 S.Ct. 1454 (1991). As noted in Federated Department Stores v. Motie, 452 U.S. 394, 401-402 (1981), this Court has looked askance at attempts to relitigate issues once they have been decided:

This court has long recognized that "[p]ublic policy" dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that

matters once tried shall be considered forever settled as between the parties." Baldwin v. Traveling Men's Association, 283 U.S. 522, 525, 75 L.Ed. 1244, 51 S.Ct. 517 (1931). We have stressed that "[the] doctrine of res judicata is not a mere matter of practice of procedure inherited from a more technical time than ours. It is rule of fundamental and substantial justice, 'of public policy and of private peace.' which should be cordially regarded and enforced by the courts...." Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 299, 61 L.Ed. 1148, 37 S.Ct. 506 (1917)... "[W]e can not be expected....to upset the general and well-established doctrine of res judicata, conceived in the light of the maxim that the interest of the state requires that there be an end to litigation--a maxim which comports with common sense as well as public policy. And the mischief which would follow the establishment of precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship." Reed v. Allen, 286, [U.S. 191], 198-199, 76 L.Ed. 1054, 52 S.Ct. 532, 81 ALR 703. [1932].

The principle of finality can only be preserved if this Court grants the state's petition for certiorari and reverses the Third Circuit's ruling, thus ending this nearly 13-year-old piece of litigation. To rule otherwise would open the door for more parties to engage in mischief similar to that engaged in by Ivy and Tiger and create cases that never end.

CONCLUSION

For the above-state reasons, respondent Sally Frank respectfully requests that this Court grant the petition for certiorari.

Respectfully submitted,

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